The Role of Ethical Values In Legal Decisions

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I

The person who is invited to comment upon a symposium enjoys one obvious advantage over the active participants in the symposium: their work is before him, he has time to reflect upon it, and so he is afforded at least the opportunity to discover the inter-play and the complementariness of the various ideas at issue. I am aware of this advantage, and shall try to profit from it.

Certainly there is no need to re-state the views that are held and the suggestions that are advanced by Dean Brown, Dr. Cohen, and Dr. Hartman. These gentlemen are thoroughly articulate; further, they are conscious of the presuppositions that are demanded by the positions they respectively defend, and also of the implications of these positions for legal practice. This degree of intellectual self-consciousness greatly facilitates the task of a commentator. Because of it, there is no need for me to search out the premises on which their arguments are based, the values that animate these arguments, nor even the crucial problems in which they culminate. All of these matters are made transparently clear in their original discussion.

But this is not to say that no difficulties remain. These men do not hold all of their premises in common; their senses of value reveal significant differences of emphasis; and they neither acknowledge exactly the same problems to be crucial, nor the same methods to be the most effective. This is as it must be at the present stage of inquiry: these men do not see "through a glass, darkly"; rather, they see clearly through their several glasses to that which still remains dark. Pushing inquiry forward from their chosen positions, they clarify many regions of the law — and particularly of the relation of law to extra-legal factors — that usually remain obscure. And the light from these various perspectives comes to a focus upon those human and social considerations that are at once the source and the destination of positive law.

It seems only proper that I should concentrate my attention at this point where these papers merge into a single question. The original symposium has established with strength and precision the dependence of legal action upon forces and purposes that are prior to law. It is here shown with great cogency that the machinery of the law is driven by energies that are themselves

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generated from a general human source; and that codes of law are directed toward ends that are defined by general human aspirations. That is, law is but one of various means by which man seeks to realize the values he envisages. But, as I have indicated, some critical uncertainties remain concerning the identification, and especially the order of precedence, of these extra-legal energies and ends. I do not pretend to be able to eliminate these uncertainties. But I cannot conceive my task as other than to indicate them and to try to arrive at a systematic statement of the matrix of facts and values that gives rise to law. The content of this symposium, through its diversity and connectedness, challenges the commentator to develop an integrated theory of the actual forces and the ideal values that determine the making of law and the rendering of legal decisions. This is the task to which I shall address myself.

II

As a background to this enterprise, it will be advisable to summarize both the common area of agreement and the significant points of disagreement that emerge from these papers. Since fruitful differences of opinion depend upon a more fundamental body of shared belief, I shall start with the latter.

The important basic legal doctrine that is accepted by all of these men can be stated in the form of three propositions. *First*: That, as a matter of fact, considerations of value pervade the actual administration of law. *Second*: That, as a matter of ideal, law should be an instrument for the realization of values. *Third*: That, consequently, it is necessary that these values that are operative in the judicial process should be made explicit, in order that they themselves may be criticized and corrected, and also in order that the efficacy of law in implementing them may be weighed. I shall discuss these propositions in turn, with emphasis on the first.

The fact that the administration of law is influenced by value-biases can be established by a line of argument that is simple and direct. Certain standards of value are an inevitable part of the psychological equipment of any mature human being. The genesis of such standards is complex: they come partly from social conditioning, partly from deliberate reflection, partly from temperament, partly from commitment to situations that favor the advancement of private interests. These standards then function as motives and purposes in human decisions: they are influential in determining what an individual will approve, both for himself and for others. Judges are human beings. Hence, they have standards and preferences of value. And these enter into the decisions that they render.

These values appear in a variety of guises, and they can be classified readily if somewhat roughly. One can at least discern these major "types" of value: religious, ethical, social, political, economic, and aesthetic. Upon matters within these domains, any judge will inevitably have norms of value; within each of these contexts, he will hold certain ends to be desirable, certain policies to be right, certain modes of behavior to be proper.

Of course, the operation of such values within the legal process is not usually open or obvious. The men who administer this process tend to regard it as ultimate and self-sufficient, and so to subordinate all other considerations to its dictates. This is particularly the case with judges when rendering the decisions that translate general legal enactments into particular commands to be enforced. The legislator obviously has to have some extra-legal reasons for writing the laws he does; unless — in a possible extreme case that sometimes seems to be his goal — he intends to deduce all his laws from some superior code, such as a constitution. And the executor of these laws deals so directly with individual persons and situations that the general human element continually impinges upon him.

The judge is more remote, both from the source of law and from its destination. It is the apparent isolation of the judge from these obviously extra-legal factors that encourages the idea that judicial decisions are merely systematic elucidations of the law and hence immune to all extraneous considerations, whether of abstract value or of concrete individuality. That is, the idea grows that the judge in his decisions does nothing but accept the law and apply it to the facts. Here, both the law and the facts are regarded as though they were completely determined and clearly defined when they are presented to the judge: he has only to bring the moment case under the applicable statute.

That this is not what actually transpires in the courts is evident to the most casual examination. And it does not transpire because the element of value influences the judge's findings both of law and of fact; and it must be so. The judge can rarely "accept" the law; he has to *interpret* it: to decide what it means, what it intends, and what is the range of its applicability. In this necessary act of interpretation, the judge supposedly puts himself in the place of the original legislator and so discovers the original intention and reach of the law. But no man can put himself in another's place; to a far greater extent, he brings the other to his own place. So legal decisions reflect the values that the judge holds. Further, the judge can never "apply" the law to the facts until he has *classified* these facts. "Facts" *per se* are unique: as such, the law cannot possibly reach them, because law is always and necessarily

general. The law refers to groups or classes, never to individuals. So the actual facts with which the judge is confronted have to be recognized and brought under a type — that is, classified. Is a particular piece of printed-matter second-class mail? Is a man an employer within the meaning of the statute? Is a company a public utility? Decisions depend upon the answers given by judges to these questions. And these answers in turn depend largely upon the judges' value standards, which obtrude into the judicial determination of what "kind" of facts the present "facts" are.

The general manner in which values force their way into the judicial process is essentially simple and direct. Many decisions are determined by the application of such concepts as "due", "just", "fair", "reasonable", used in both a substantive and procedural sense. Again, many decisions are controlled by such terms as "public policy", "general welfare", "social interests", "individual rights", "equitable outcome". Each of these terms is thoroughly teleological — it defines ideal situations which the law should strive to realize. Further, each of these terms is vague to the verge of ambiguity: it describes this desirable situation only in general, and it is left to the judge to specify it. Finally, the situations that are stipulated by these terms are often in opposition: if a decision is to promote public policy, it may have to qualify private rights; and the maintainance of due process may violate the demands of equity.

Consequently, the very nature of these concepts — which are basic and pervasive in the law — makes it impossible to "apply" them in any routine manner. Laws and facts cannot be brought together, and a decision precipitated, until the former have been interpreted and the latter have been classified. Both of these acts depend largely upon the relative importance that the judge assigns to the different interests and purposes that are at issue in the instant case. The recent history of the "clear and present danger" doctrine of "constitutional rights" and contempt procedings, and of the legal status of labor unions, are cases in point. As Dr. Cohen points out, this assignment of relative degrees of importance is a matter of value discrimination: "the theory of importance is a theory of value". Thus, decisions regarding both the interpretation of law and the classification of facts presuppose the continual operation of norms of value.

Not only is this actually the case, it is proper that it should be so. For these men are further agreed in their insistence that it is of the essence of law to be an instrument for the realization of values. Law is the expression of forces that fashion and use it purposefully, it is directed toward ends that it does not itself de-

fine, and it is responsible to superior standards. In sum, law is subservient to justice.

To the average lawyer, as well as to the layman, this agreement will hardly come as a surprise: it will probably appear as no more than a recognition of the obvious. Yet this agreement is really quite significant. For there are powerful movements in modern social and legal thinking that would strenously deny both of these points. The Austinian school of analytical jurisprudence is probably moribund, but much of its central dogma has been retained and even carried further by contemporary schools. In the context of the present discussion, the crucial tenet of this general position is the doctrine that law is devoid of value content and beyond the reach of value determinants. Legal positivism, the pure theory of law, most socio-cultural philosophies of law, the various psycho-physiological analyses of the judical process, and the movement of descriptive jurisprudence — all of these agree in treating law in a factitious manner. The law is what it is declared to be by those clothed with legal authority, and the whole concern of legal philosophy should be to study the various social, economic, and personal factors that influence the decisions that are reached. This approach to law is purposefully amoral. It regards all value considerations as subjective and unrealistic, and maintains that it is impossible to measure law against any superior — much less objective — value standards. It limits itself to two concerns: first, an understanding of the power-systems that determine the making of law; second, the ability to predict and control the course of legal decisions and the effects of these decisions on human behavior. The motives that animate this general movement are diverse: the desire to make the law more certain and definite, the recognition that law is a function of social conditions, the belated discovery that judges are human beings, the emphasis on economic forces as legal determinants, the reductionist fallacy that has swept modern thought, and the laudable ambition to make law an exact empirical science. Some of these motives are good and some of them are bad. But they all tend in the same direction: to remove law from normative considerations by making it a purely descriptive discipline.

It is therefore interesting and encouraging to find the whole tenor of this symposium centered in the other direction by its insistence that values actually do and properly should pervade legal decisions. Agreement on these two points calls forth agreement on a third: the value patterns that are held by judges, and that influence legal decisions, are often unconscious, unsystematic, and even inconsistent. To the extent that this is the case, the judicial process is made subservient to standards that are uncriticized,

variant, and incoherent. Hence, it is a task of the first importance to render explicit the norms of value that are actually operative. It is only in this way that a society can criticize and correct the values it accepts, and that legal decisions can be kept sensitive to the expectations of society.

So much for the important area of legal thought that these papers exploit in common. We can now turn more briefly to the divergencies that they exhibit. It is granted by all that the processes of law should be governed by certain norms and directed toward certain ends. The crucial question now arises: What are the source and the content of the values that should determine legal decisions? The answer given to this question will control the direction in which the further development of the law is to be carried. And to this question these men return different answers.

Dr. Cohen places particular emphasis upon the point that legal decisions should be relevant to current social ideals. He envisages the law as primarily an instrument of public policy. Hence, the most basic responsibility of the judge is to espouse dominant social values; for it is only in this manner that he can keep his decisions sensitive to the interests and aspirations of the people of his society. It is the controlling tenet of his position that the law should derive its values chiefly from the moral temper and the social purposes of the people it serves.

Dean Brown bases his position upon the concept of natural law. This body of "higher law" is grounded in religious and ethical principles; it is held to precede, and to be superior to, positive law; it provides an "externally existent body of ideals" which defines the ends the positive law should serve. It is only to this higher law that "supreme value" attaches; the relative value of positive law derives from its success in realizing the purposes contained in the higher law.

Dr. Hartman centers his interpretation around the concept of a science of axiology. Axiology — the science of values — is envisaged as an autonomous discipline, independent of theology, metaphysics, and ethics; it has its own axioms, from which it derives its body of value-knowledge by strictly logical methods; it stands to the humanities — including law — as mathematics stands to the natural sciences. Axiology discovers, defines, and orders the values that it is proper for man and society to realize. The content of law is then controlled and judged by its faithfulness to these value norms.

In closing this phase of my discussion, I must again stress that these statements do not pretend to be complete accounts of the doctrines they present. These men are quite comprehensive in the positions they define: each senses the complexities and the

tensions that are resident in the law, and so recognizes the dangers of a simplistic interpretation. But they do have, I think, the different emphases I have described. Each takes some one aspect of the extra-legal basis of law and makes it central. In sum, they find the primary ground of law in different places.

What I now propose to suggest is an independent and systematic analysis of the source and destination of law. I think it is clear that law is the product of a multiplicity of forces, and that it serves a multiplicity of values. I shall reach toward a complete and organized statement of these forces and values. Then, perhaps, each of the interpretations of law that has at times occupied the attention of jurisprudence can be seen as a grasp of one facet of the total situation from which law emerges and of the total problem that law is called upon to solve. I am here concerned to define in quite abstract terms the extra-legal matrix that gives rise to positive law.

III

What is law? The phrasing of this question — like that of all similar questions, such as What is nature?, What is life?, What is man?, What is good? — is linguistically simple. This has deceived men into thinking that the question must have an equally simple answer. And a variety of such have been proposed: Law is what the sovereign enunciates; Law is what the judge declares; Law is the expression of dominant private interests; Law is the objectification of the General Will; Law is the reflection of Justice; Law is custom made explicit. These are but a sample.

It is not my intention to add to this list: I shall not propose any concise definition of law. As I have indicated, I think that all such attempts to reduce the law to one controlling characteristic — to identify the essence of law — obscure more than they disclose: they exhibit strikingly some one feature of law, but they ignore other features. Such an approach to the problem must issue in a Procrustean treatment, because it insists on fitting a complex factual situation into a simple conceptual schema.

I intend to analyze law in terms of the problem with which it deals. Instead of asking What is law?, I shall ask Why is law? And if this latter question seems teleological, and so "un-scientific", let me say at once that I mean by it only an inquiry into the circumstances that give rise to law and the solutions that law is intended to yield. That is, I am proposing an inquiry that is functional rather than substantive. The advantage of such a method is that, by focusing attention on the genesis and the purpose of law, it should prevent us from making false abstractions. When law is regarded as something that "is", it yields easily to facile

simplifications; when law is regarded as something that "does", it asserts its concreteness and complexity.

As soon as we look at the law from this perspective, a salient fact emerges: law is continually trying to resolve various tensions. In doing its work — in performing its function — law is confronted by different sets of conflicting tendencies; and much of the effort of law is directed toward effecting a reconciliation of these tendencies. In advancing this as a basic and pervasive feature of law, I am merely generalizing from a number of recognitions of its specific occurrence. The literature of jurisprudence is replete with studies of problems where the law is torn between competing forces, or is made to choose between competing goals. In fact, one is justified in saying that every general theory of law, and every analysis of special legal problems, culminates in a dilemma: law seems always called upon to meet demands that are contradictory.

The best way to clarify this phenomenon is by citing several cases of its occurrence. I shall merely list these, with no elaboration: they are sufficiently familiar to carry their own commentary.

1. The effort of law to guarantee both freedom and order.
2. The demand that law provide stability and yet allow for change.
3. Law as an instrument of both efficiency and justice.
4. Law as both protecting rights and defining duties.
5. Law as mediating between private interests and the general welfare.
6. Law as determined and law as flexible.
7. Law as defining general demands that are above and blind to individual cases, and law as always dealing with and so having to adapt itself to individual cases.
8. Law as protecting the inviolability of human character, and law as controlling the course of human conduct.

These are among the legal dilemmas that the judge encounters most frequently in his decisions and the theorist in his explanations.

Thus, when we watch the legal process in operation, the conclusion is forced upon us that the law, responding to contradictory stresses, strains toward a compromise that can never be reached. If the law has an essence, it is paradox. This is a conclusion with which it is difficult to be content. Yet it is a conclusion that must be acquiesced in. The legal process, like the electric spark, leaps across a gap between poles that are opposite in sign. To carry the analogy further, the legal process is generated solely by the energy resident in these two poles; it harnesses this energy, and directs it toward the improvement of man's condition; when the legal process disposes of this energy in a wise and efficient

manner, it achieves a high degree of tolerance between these poles and allows their close juxtaposition. But neither law nor the electric spark, no matter how much energy they carry off, can annul the contradictions that give rise to them. Not, at any rate, until a state of physical and social entropy has been reached.

So we must accept the law as a continual effort to maintain a compromise between forces and purposes that are ultimately irreconcilable. But this acceptance does not entail that the law is an "irrational", which can only be described in detail and never understood in principle. We cannot and need not be content with a mere listing of the dilemmas the law faces. We suspect a connection between these various situations of tension; we sense that they are not discrete occurrences, but related manifestations of the elements with which law deals. And so we are led to search for the primitive and protean tendencies that compete on various levels and produce the various tensions that law attempts to resolve.

In this search, I am already committed to a method. Law is a process, not an entity. Like any process, it is a transition from the past to the future: certain conditions determined its genesis and control its direction. It is these conditions that we must discover and analyze. Law is a solution to a problem — an answer to a question. It is the simplest common-sense that you cannot understand an answer until you have understood the question to which it is addressed.

We start with the genesis of law. And our first steps can be taken quickly and easily. Positive law is a human product. Further, positive law is a social product. Finally, positive law had a beginning in time and has undergone a development. There were — there still are — societies in which the principles and institutions of positive law are non-existent; there are others in which they occur in only a rudimentary state. So law must be a phenomenon that was initiated by gradually accumulated changes in human nature and in the modes of social life. If we can discover the character of these changes, and particularly of the conditions in which they culminated, we should be at the heart of the legal process and so able to understand law in terms of its own inner principles.

To answer the questions of when and why law arises involves an element of speculation; but there is a respectable mass of historical, anthropological, and even biological evidence to support this speculation. I do not here have the space to document my case, nor even to support it in detail. I shall state my argument quite starkly and directly.

Law makes its appearance as one component in the transition

of man from primitivism to civilization. In this transition, there are two primary conditions that generate law. The first of these is the individuation of persons out of the social group. Probably the most salient feature that distinguishes civilized from primitive man is the strong sense of his own personality that the former has. Primitive man regards himself as closely bound to his group; as sharing and participating in all of its fortunes; as virtually a part of it, with no proper standing apart from it: the totemic system expresses all of this very clearly. This close psychological bond is both cause and effect of the much emphasized fact that within primitive society men are highly similar: there are few wide differences in education, function, or status; patterns of behavior are rigorously defined by a system of taboo that has the sanction of natural law; when men deviate from this — as they inevitably do — their tendency is to acknowledge guilt and denounce themselves.

In all of these respects, civilized society presents a quite different set of conditions and attitudes. Civilized man has precipitated out of the primitive group; he conceives and pursues his private ends; he forms intra-social groups based on special and restricted interests. In short, he asserts himself. In the course of this change, society ceases to be a monolithic and homogeneous field; its bonds weaken; it has to accept and adjust wide individual differences. So society becomes a One and a Many. It maintains its unity; but this unity is now that of a Whole made up of largely separate Parts. This is the original condition that brings law into being. The first basic tension that law must resolve is that between the social whole and its human parts. Law is most fundamentally a device for defining and assuring certain patterns of individual behavior, and for administering a power system that can prevent social disruption. The evidence indicates that the original tendency of law — as of religion and morality before it — when it is confronted with this problem, is to re-absorb the individual within the group; that is, to reduce men solely to the status of parts, and so to use law solely as an instrument of social organization and efficiency. The theoretical overtones of this effort reverberate quite clearly as late as the *Republic* of Plato, and they are echoed in the doctrines of modern totalitarianism; their practical overtones, of course, we have always with us.

However, this attempt fails. Man persists in the assertion of his individuality, and so establishes societies that exhibit great heterogeneity of status and function. And then a second step occurs. Man transfers his self-assertion from the level of the actual to the level of the ideal. He not only does in fact enunciate his individual status and pursue his private interests; he declares that he is right in doing so, and that society must confirm and promote

his claim. This act constitutes the proclamation of human dignity. What is here asserted is the doctrine that the locus of social value lies in individual men. Man now becomes an end in himself. And society becomes a Means to this End. Society is still the ultimate repository of organized human power; but this power is now dedicated to purposes that are supra-social. This condition completes the genesis of law. Law is now envisaged as a device for defining and assuring the sanctity of the individual, and for administering a value system that is based on personal self-realization.

Herewith, law is confronted with a new and far more complicated source of tension. It is asserted as a tenet of the human ideal that each man is an end in himself; and society is declared to be a means to the achievement of this ideal. So society is a means to a plurality of ends. Further, these ends — these individual loci of value — often assert purposes that are divergent or even contradictory. So society has to qualify its various ends before it can further them. This second basic tension that law must resolve is that between society as a single organized means and the plurality of individuals who assert themselves as ends. The simplest theoretical solution of the problem this poses is to credit every man's self-estimate, and to treat society — and the law — as the mere executor of whatever compromise men may strike between themselves, or can impose on one another. This solution has sometimes been approached in practice, and inevitably it has failed. Then law is called upon to establish certain limits within which self-assertion is guaranteed but beyond with it is restrained.

We can now put together the two moments of this analysis, and arrive at a full statement of the problem that lies at the root of law. In the first place, law has to mediate between the social group as a functional whole and the individual men who are its constituent parts. In the second place, law has to mediate between a plurality of human beings each of whom is regarded as an end-in-himself and society as a functional means. In the course of performing this dual task, law transmutes the elements with which it works: it transforms society into the State; and it transforms men into Persons. In each case, the nature of the transformation is the same: the State and Persons are precisely defined, both separately and in relation to one another; their powers and limitations, their rights and duties, are explicitly set forth; and institutions are established to maintain and modify these defined positions.

The original conditions that give rise to law — the original demands that law is called upon to meet — can now be brought out sharply. Law has to create a State that combines the characteristics of a whole and a means. And law has to create Persons who combine the characteristics of parts and ends. These are the

basic relations to the maintenance of which law is committed. And it is at once evident that each of these relations is contradictory. Elsewhere in nature, the relation of whole to parts is always that of end to means. Whether we consider organisms or mechanisms, the parts are subordinate to the whole; purpose and value adhere in the whole — it is the living creature or the engine that is the object of concern; their parts have value only as they function to promote the purposes defined by the whole. Here, the problem posed by the relation of parts to whole is only one of organization; the parts are sheer instruments, and the only consideration paid to them is in view of their efficiency in contributing to the whole. This is how the matter stands with men and with machines.

But the matter stands otherwise with society: here, the whole is to its parts as means to ends. This relationship is utterly unique to the social situation. And it is a tissue of contradictions. How can the parts of a whole have the status of ends that the whole must serve? How can a means function as a whole which determines what ends it is to serve? How can ends have the subservient position of parts within a whole? How can a single whole serve as a means to a plurality of different and divergent ends? There seems to be no logical answer to any of these questions. Yet it is the function of law to provide answers to all of them.

I have so far stated my argument in a largely empirical and historical manner. I shall now state it in an abstract manner. The total situation out of which the law arises, the basic elements with which law deals, can be schematized in this way:

State as Whole	State as Means
Persons as Parts	Persons as Ends

It is my argument that this is the matrix from which law emerges. The function of law is to resolve the tensions that occur among these elements. Different theories and systems of law result from placing the major emphasis on different ones of these terms and on different ones of the tensions that arise among them. Different conceptions of the role of values in law depend upon different attempts to find for law a basis outside of this system of tensions, such that law would have some secure standards in terms of which to settle the pressures that are exerted on it by each of these terms.

To complete this analysis of law, and especially to clarify the operation of values on determining law, we must turn attention from these elements with which the law deals to a consideration of the relationships that law seeks to establish. But first, I should like to translate these terms into their political and legal equivalents. That should make them appear more realistically as actual elements of law and not as mere figments of abstraction. Further,

it should emphasize the important fact that each of these terms is continually present in the legal process. I shall identify these elements only briefly through the basic concepts and doctrines that express them in our own legal tradition.

The state as whole is recognized and justified in the concept of Sovereignty; its modes of operation as such are defined through the doctrines of police power and the public welfare. The state as means is defined through the concept of the Social Contract; its role as such is assured through all the machinery of representative government and limited powers. Persons as ends are proclaimed through the concept of "free and equal creation"; their precise status as such is defined through the doctrine of Natural Rights. The final element, persons as parts, is less easy to identify and characterize within our tradition; and this is indicative of the nature of this tradition. But this element is explicitly recognized in the concepts of civic duties and social responsibility; and it is implied in the doctrine of the General Will, which speaks for all and demands the allegiance of each.

This translation of the elements that enter into the matrix of law should render them more familiar. But for purposes of understanding law, it is best to return to the elements as schematically determined. The concepts and doctrines that I have cited are surcharged with emotion. This makes them more powerful tools of political life; but it unfits them as tools of intellectual analysis. Their very familiarity and emotional content leads us to think that through them we have already solved the problem of law. But a moment's reflection will dispel this illusion. For these basic concepts are in a state of constant tension among themselves: their inter-play raises more problems of legal value than it solves. The state is the agent of society, and so is Sovereign. But the state is bound to the terms of the Social Contract. But the state has the final power to interpret the Social Contract so as to promote the General Welfare. But the General Welfare is the expression of the General Will of the people. But the state measures the General Will against the provisions of the Constitution. But the Constitution is an instrument of Natural Rights, and these inhere in the people.

And there is no final term to this dialectic. These concepts define and hallow the values to which our tradition has dedicated law. But they do not tell the law how to resolve the tensions that arise among these values. And they obscure the problem at issue just because they pretend to solve it once and for all. To clarify this problem we must return to the more abstract terms and schema that we derived.

IV

The general problem of law, as I have already defined it, is to administer a State that is both whole and means and Persons who are both ends and parts. The further specification of this problem demands an analysis of the various relations that arise between these four terms. There are six of these:

1. State as whole and state as means.
2. Persons as ends and persons as parts.
3. State as whole and persons as parts.
4. Persons as ends and state as means.
5. Persons as ends and state as whole.
6. State as means and persons as parts.

The function of law is to maintain all of these relations. Where law directs its efforts primarily toward some of them, at the necessary expense of others, the quality of social life suffers. The difficulties that law encounters in its pursuit of value can be clarified by a brief consideration of these relations.

The first two relations constitute the basic paradoxes of social life. The first — State as whole and means — can be characterized as the paradox of disinterested power. The problem here is to create an organ of public authority that will have sufficient power to control all of the private groups within society, and will use this power sensitively and impartially to promote the interests of these groups. The state must acknowledge all the private interests that are urged upon it, yet it cannot honor all of these; some are accepted and some are rejected; this is inevitable, and the task of law is to see that the selection is based on sound values. The second of these relations — Persons as ends and parts — constitutes the paradox of institutionalized individuals. The individual, regarded as a locus of value, is encouraged in the adventure of self-realization; but the directions in which he can seek this must be limited, in his own best interests as well as in those of society. These limits are roughly defined by religion and morality, and are inculcated by education. But law frequently has to evaluate the estimates that people make of themselves as ends and to qualify this by reference to their status as parts.

The next two relations, considered separately, pose no serious problems. That of persons as parts to state as whole is largely administrative: the state as the agent of the social group insists upon legal mechanisms that will enable it to act with efficiency. That of state as means to persons as ends is essentially one of representation: persons as the constituents of the social group insist upon legal mechanisms that will faithfully translate their purposes into social policy. Considered in conjunction — which is the way in which they always occur — these relations raise all the diffi-

culties I have already discussed: a means has to decide upon the ends it is to serve, so law has to determine the relative value of competing ends; and ends have to be subordinated as parts of a whole, so law has to determine the relative value of private interests and the public interest.

The last two relations are again antithetical; but they expose quite a new facet of the problem of law. What is here discovered is the fact that law, being constituted of both ideal and actual elements, continually seeks the sanctuary of doctrines and standards that are immune to time and change and yet continually confronts circumstances that are novel and fluid. The relation of State as whole and Persons as ends expresses man's striving for a completed and permanent conception of values. To define this relation is to lay down a lasting pattern of ethical norms and political practice. It consecrates standards and purposes that are declared to be absolute. Law operates on this level through the means of such documents as Declarations and Constitutions. The relation of State as means and Persons as parts is a recognition that all human decisions are imperfect and temporary. It asserts the need for continual change, because all conditions are temporary and all purposes relative. And so it demands that the legal process be alert and sensitive to the flux of events with which it deals. For obvious reasons, law is reluctant to heed this claim in principle; but it satisfies it in practice by the doctrine that every case is unique, and also by the enunciation that it is the spirit of the law, not the letter, that should control. In this dimension, law is torn between one tendency toward internal coherence and another tendency toward external flexibility. The decision as to how to compromise these always involves a judgment of importance, or value.

These are the continuing tensions that law must resolve. It can resolve them only by an appeal to values: that is made clear in every case. Where does law derive these values?

The answers given to this question by philosophers of law usually exhibit a common motive: they seek to make these values independent of the elements with which law deals and separate from the context within which law operates. The basis for this motive is apparent: it is felt that law can perform its function of resolving the tensions of actual social life only if it has a standard that cannot be distorted by these tensions. Law is to derive its values from some objective and absolute source that is immutable, and so immune to pressures from the actual; that is, law is to have access to the ideal, which it then imposes upon the actual. The nature and source of these supra-actual values has been defined in various ways: they have been grounded in religion, as by

Dean Brown; in scientific method operating with ethical axioms, as by Dr. Hartman; in the moral and social sense of humanity, as by Dr. Cohen. And other possibilities have also been explored.[1]

I think it is clear that law derives from and depends upon all of these extra-legal sources. Law is an instrument that man uses in the pursuit of all of the values toward which he aspires. But this insistence that law is oriented toward the ideal, while sound and necessary in itself, should not blind us to the equally valid point that law is grounded in the actual. Law envisages a perfect order, and reaches for a permanent code that can adjust individual differences with complete justice and no friction. But law deals with human imperfections, with irreconcilable tensions that spring from conflicts of interests, and with continually changing conditions in the physical and social environment. So it is of the essence of the law to be always torn between the ideal and the actual, the permanent and the changing, the right and the necessary, the general principle and the concrete case.

These tensions appear most interestingly in the issues raised by the case of *Oleff v. Hodapp*.[2] The Ohio Supreme Court decided the case on the ground that the law covering the point was precise, that it established actual rights and relations, that it defined a concrete course of action; and the Court held that it was not the function of judicial law to upset these actual constancies in the name of extra-legal principles. From one point of view, as Dr. Hartman cogently argues, this decision is altogether right. From another point of view, as Dean Brown and Dr. Cohen insist, it is altogether wrong. This point is made by Williams, J., in his dissenting opinion. He says: "It is always hard to be forced to sacrifice the right for the sake of a syllogism"[3]; and he argues that it is not here necessary. In a recent case in the Federal Court of Appeals, the position of Judge Williams is defined with force and brevity in an opinion by Judge Dobie. The case at issue is generically similar to that of *Oleff v. Hodapp* in that it concerned the question of profit gained by methods that cannot be morally approved; it is specifically different in that it involves the running of various sorts of statutes of limitation. The opinion of the court, as expressed by Dobie, C. J., sums up the question in this manner:

> The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legislative distinction between the closely related types of statutes of limitations.
>
> Here the proper approach is not technical and conceptualistic. Rather, we think it should be realistic and hu-

[1] See in this Volume, H. W. Smith, *Science Versus Metaphysics*, p. 53.

[2] 129 Ohio St. 432, 195 N.E. 838 (1935).

[3] *Id* at 447, 195 N.E. at 844.

> mane. The spirit, not the letter, should control. Qui haeret in litteris, haeret in cortice.[4]

And so it goes, on whatever level and in whatever context we examine law: for every *pro* there soon appears a *contra*. In explanation of this fact, which lies at the heart of law, I have conducted a long and abstract analysis. But now, I think, the lesson of this analysis can be made quite simply and concretely. The crucial problem of law concerns administration rather than content. Law must derive the latter from extra-legal sources, and it can never be completely guaranteed: that is, we can never be certain of our knowledge of the content and precedence of values. But law largely generates and preserves its procedures out of its own resources. And it can control these, so as to keep them always sensitive to both value and fact, both ideal and actual, both the right and the necessary, both the permanent and the changing elements of life. As I insisted earlier, the law must be considered functionally rather than substantially: as a method for settling questions rather than as a finished answer. This insistence can now, at the end of my inquiry, be put in more definite terms: law is less a repository of value standards than a process for rendering value judgments.

[4] Scarborough v. Atlantic Coast Line R. Co., 178 F. 2d 253 (1949), *cert. denied*, 339 U.S. 919 (1950).